

STATE OF FLORIDA
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CLERK OF THE COMMISSION

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: SEPTEMBER 20, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK AND ADMINISTRATIVE SERVICES (BAYO)

FROM: DIVISION OF LEGAL SERVICES (CHRISTENSEN/HELTON)
DIVISION OF COMPETITIVE SERVICES (BUYS)
DIVISION OF CONSUMER AFFAIRS (DURBIN)

RE: DOCKET NO. 010409-TP - PETITION BY CITIZENS OF STATE OF FLORIDA FOR INVESTIGATION OF TALK.COM HOLDING CORP. D/B/A NETWORK SERVICES D/B/A THE PHONE COMPANY AND ITS AFFILIATE, THE OTHER PHONE COMPANY, INC. D/B/A ACCESS ONE COMMUNICATIONS, FOR WILLFUL VIOLATION OF RULE 25-4.118, F.A.C.

DOCKET NO. 010564-TX - INVESTIGATION OF POSSIBLE VIOLATION OF COMMISSION RULES 25-4.118 AND 25-24.110, F.A.C., OR CHAPTER 364, F.S., BY THE OTHER PHONE COMPANY, INC. D/B/A ACCESS ONE COMMUNICATIONS, HOLDER OF ALEC CERTIFICATE NO. 4099, AND TALK.COM HOLDING CORP. D/B/A NETWORK SERVICES D/B/A THE PHONE COMPANY, HOLDER OF ALEC CERTIFICATE NO. 4692.

AGENDA: 10/02/01 - REGULAR AGENDA - SHOW CAUSE - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\010409.RCM

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CASE BACKGROUND

- July 29, 1992 - Tel-Save, Inc. d/b/a Network Services d/b/a The Phone Company obtained Florida Public Service Commission Interexchange (IXC) Telecommunications Certificate No. 2985.
- August 29, 1996 - Tel-Save, Inc. d/b/a Network Services d/b/a The Phone Company obtained Florida Public Service Commission Alternative Local Exchange Company (ALEC) Certificate No. 4692.
- April 9, 1998 - The Commission issued Order No. PSC-98-0495-AS-TI, in Docket No. 971218-TI, accepting a \$5,000 settlement offer from Tel-Save, Inc. d/b/a Network Services d/b/a The Phone Company to resolve the apparent violation of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries. In this docket, the company had apparently failed to provide staff with the billing records necessary following a service quality evaluation. Additionally, it was noted in this docket that 124 customer complaints were received by the Division of Consumer Affairs between January 1, 1995, and September 30, 1997. Of the 124 complaints received, 88 were closed as violations, 77 of which were slamming infractions.
- October 20, 1999 - The Commission issued Order No. PSC-99-2049-FOF-TP, in Docket No. 991389-TP, acknowledging the name change on IXC Certificate No. 2985 from Tel-Save, Inc. d/b/a Network Services d/b/a The Phone Company to Talk.com Holding Corp. d/b/a Network Services d/b/a The Phone Company (Talk.com).
- June 6, 2000 - The Commission issued Order No. PSC-00-1097-FOF-TX, in Docket No. 000438-TX, acknowledging the name change on ALEC Certificate No. 4692 to Talk.com Holding Corp. d/b/a Network Services d/b/a The Phone Company.
- August 3, 2000 - The Commission issued Consummating Order No. PSC-00-1428-CO-TP, in Docket No. 000452-TP, which made Order No. PSC-00-1245-PAA-TP effective and final, approving the transfer of ownership and control of The Other Phone Company, Inc. d/b/a Access One Communications to Talk.com. (IXC Certificate No. 4100 and ALEC Certificate No. 4099)

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- April 6, 2001 - The Office of the Public Counsel (OPC) filed a petition on behalf of the Citizens of the State of Florida for investigation of Talk.com Holding Corp. d/b/a Network Services d/b/a The Phone Company (IXC Certificate No. 2985) and its affiliate, The Other Phone Company, Inc. d/b/a Access One Communications (IXC Certificate No. 4100), for willful violation of Rule 25-4.118, Florida Administrative Code. Docket No. 010409-TP was opened in conjunction with the OPC's petition.
- April 20, 2001 - Docket No. 010564-TX was opened by staff to investigate possible violations of Rule 25-4.118, Florida Administrative Code, and Chapter 364, Florida Statutes, by Talk.com Holding Corp. d/b/a Network Services d/b/a The Phone Company (ALEC Certificate No. 4692) and its affiliate, The Other Phone Company, Inc. d/b/a Access One Communications (ALEC Certificate No. 4099).
- May 8, 2001 - Staff, the OPC, and Counsel for Talk.com Holding Corp. met in Tallahassee to discuss these dockets. Staff informed Talk.com that it would review all complaints against the company, and its affiliate, including those that were closed as apparent rule violations and those that were closed as apparent non-infractions. Staff also requested that the company provide its own analysis of the consumer complaints which had been filed with the Commission.
- May 31, 2001 - Since July 1, 1999, the Commission received a total of 1,381 consumer complaints against the four certificates held by Talk.com, and its affiliate, The Other Phone Company, Inc. d/b/a Access One Communications.
- June 4, 2001 - Talk.com filed its analysis of the consumer complaints received by the Commission as staff requested in the meeting on May 8, 2001. The company concluded that most of the complaints were from customers who experienced problems with the company's service prior to November of 2000. The company further concluded that the problems were the result of its entry into the provisioning of ALEC telephone services through its newly acquired affiliate, The Other Phone Company, Inc. d/b/a Access One Communications.
- June 15, 2001 - The Commission issued Order No. PSC-01-1306-FOF-TP, in Docket No. 010709-TP, acknowledging the request for

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name change on IXC Certificate No. 2985 and ALEC Certificate No. 4692 from Talk.com Holding Corp. d/b/a Network Services d/b/a The Phone Company to Talk America, Inc.

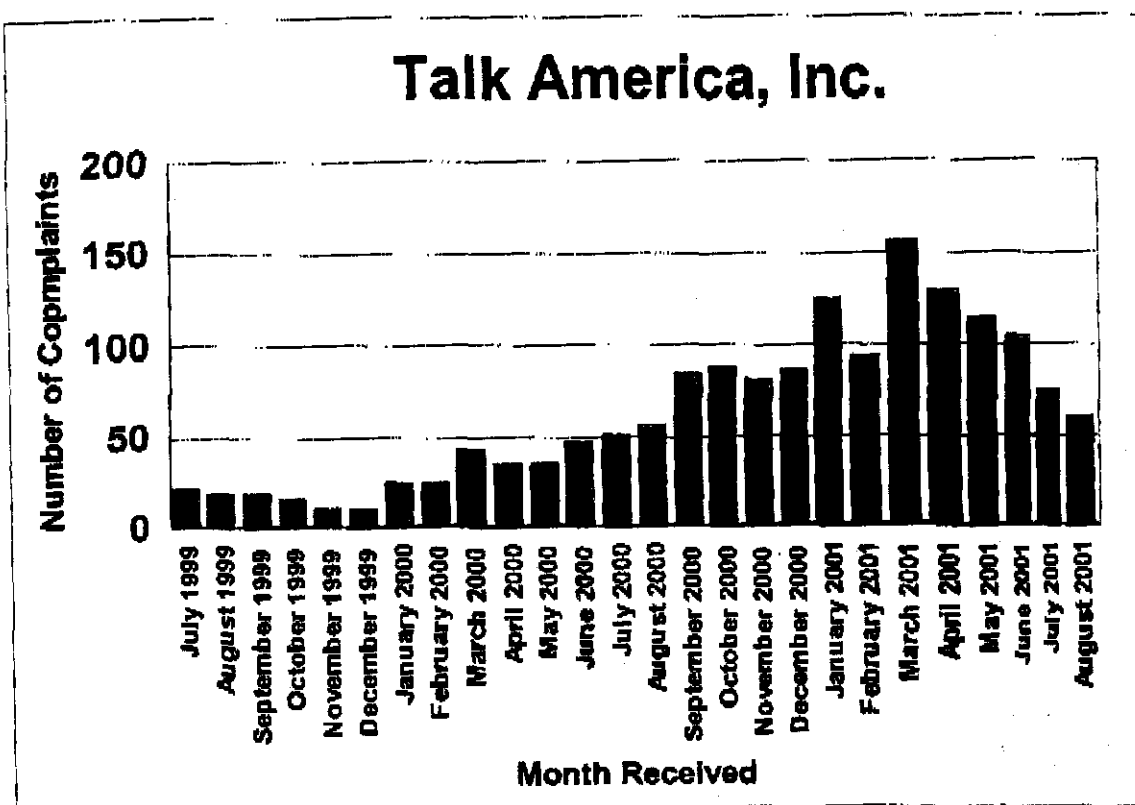
- June 21, 2001 - The Commission issued Order No. PSC-01-1361-PCO-TX, in this Docket, granting a motion filed by Talk America, Inc. (f.k.a. Talk.com Holding Corp.) to consolidate Docket Nos. 010564-TX and 010409-TP.
- June 22, 2001 - Staff completed its analysis of the complaints received by the Commission during the period of July 1, 1999, through May 31, 2001, regarding the local and intrastate interexchange telephone service provided by Talk America, Inc. through its four certificated entities. Based on the significant increase in complaints against the company since January 2000, (see CHART 1) staff reviewed all of the closed complaints filed against Talk America, Inc. during the specified time period to determine the nature of the complaints and assess any trends or problems.

Staff reviewed 1,024 of the 1,381 complaints filed during the period July 1, 1999, through May 31, 2001, and determined that there are a total of 657 apparent violations. Staff did not review the remaining 257 complaints because those complaints were not yet closed and still pending a resolution. The majority (627) of the apparent violations are for switching a customer's telephone service provider without proper verification and disclosure as prescribed by Rule 25-4.118, Florida Administrative Code, and apparent improper billing practices prohibited by Section 364.604(2), Florida Statutes. Staff also concluded that there are 30 apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints.

Chart 1 also indicates a decrease in complaints filed against Talk America since April 2001, but staff believes that the number of complaints being filed by consumers is still too large.

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- June 27, 2001 - Staff, the OPC, and Counsel for Talk America, Inc. met in Tallahassee to discuss staff's analysis of the customer complaints and the possibilities of resolving the issues in these dockets. Staff presented parties with a summary of its analysis which included the number and type of apparent violations. Staff requested that Talk America, Inc. also analyze the same complaints and provide to staff a list of the complaints where it disputes staff's conclusions.
- July 6, 2001 - Staff and the OPC visited Talk America, Inc.'s facility in Palm Harbor to review the company's operations.
- August 3, 2001 - Staff, the OPC, and Counsel for Talk America, Inc. met in Tallahassee to discuss the company's proposed resolution to the issues in these dockets. Talk America, Inc.

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suggested a possible monetary settlement to resolve the issues but was unwilling to put it in writing and requested that it be kept confidential. Staff again requested that Talk America, Inc. analyze the same complaints that staff analyzed and provide to staff a list of the complaints where it disputes staff's analysis.

- September 5, 2001 - Talk America, Inc. submitted a preliminary assessment of the complaints it analyzed. In its preliminary report, the company stated that it believes that many of the complaints now identified as apparent rule violations by staff are not rule violations. However, the company still did not provide to staff a list of the complaints where it disputes staff's conclusions.
- Talk America, Inc.'s Intrastate Operating Revenues as reported on its Regulatory Assessment Fee forms are summarized in TABLE 1.

TABLE 1

Entity Name	Certificate Number	Period Covered	Intrastate Operating Revenue
Talk America	IXC - 2985	01/01/2001 - 06/30/2001	\$2,431,404.95
Talk America	ALEC - 4692	01/01/2001 - 06/30/2001	\$1,660,229.46
Access One Communications	IXC - 4100	01/01/2000 - 12/31/2000	\$237,942.47
Access One Communications	ALEC - 4099	01/01/2000 - 12/31/2000	\$543,351.35

These two dockets have been consolidated at the company's request. Therefore, in the interest of simplification, staff combined all of the apparent violations against Talk.com's four certificated enterprises under one entity. Talk.com Holding Corp. d/b/a Network Services d/b/a The Phone Company (a.k.a. Talk America, Inc.) and its affiliate, The Other Phone Company d/b/a Access One Communications, will be collectively referred to as "Talk America" throughout the remainder of this recommendation.

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- The following table (TABLE 2) summarizes the number of complaints that staff believes are apparent violations. The rule or statute is listed in the first column. The second, third, fourth, and fifth columns list the apparent violations against each of the company's certificates cited in this docket for the period July 1, 1999, through May 31, 2001. The last column lists the total number of apparent violations against the company as a whole during the same period.

TABLE 2

TALK AMERICA, INC. APPARENT VIOLATIONS by Certificate Number					
	2985 IXC	4692 ALEC	4100 IXC	4099 ALEC	TOTAL
<u>ISSUE 1</u> Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection	298	149	3	72	522
<u>ISSUE 2</u> Section 364.604(2), F.S., Billing Practices Billing Practices	61	35	2	7	105
<u>ISSUE 3</u> Rule 25-22.032(5)(a), F.A.C., Customer Complaints	0	0	5	25	30
TOTAL	359	184	10	104	657

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.01, 364.19, 364.183, 364.285, 364.337, 364.603, and 364.604, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission order Talk America, Inc., holder of Certificate Nos. 4099, 4100, 4692, and 2985, to show cause why it should not be fined \$10,000 per apparent violation, for a total of \$5,220,000, for 522 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection?

RECOMMENDATION: Yes. The Commission should order Talk America, Inc. to show cause in writing within 21 days of the Commission's order why it should not be fined \$10,000 per apparent violation, totaling \$5,220,000, for 522 apparent violations of Rule 25-4.118, Florida Administrative Code, Toll, Local Toll, or Toll provider selection. The company's response should contain specific allegations of fact and law. If Talk America, Inc. fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the fine should be deemed assessed. If Talk America, Inc. pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate Nos. 4099, 4100, 4692, and 2985 should be canceled. (Christensen, Helton, Buys)

STAFF ANALYSIS: Upon review of 1,024 complaints received against Talk America during the period from July 1, 1999, through May 31, 2001, staff determined that 522 are apparent slamming violations. Staff discovered that in a large number of the 522 complaints, the Letters of Agency (LOA) or recordings of the third party verification (TPV) submitted by Talk America in response to the complaints did not include all of the information required by Rule 25-4.118(2)(c), Florida Administrative Code. In other complaints, Talk America did not provide any documentation that would prove to staff that the customers authorized Talk America to change their service provider.

Rule 25-4.118(1) and (2), Florida Administrative Code, states:

(1) The provider of a customer shall not be changed without the customer's authorization. The customer or

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other authorized person may change the residential service. . . . or

(2) A LEC shall accept a change request from a certificated LP or IXC acting on behalf of the customer. A certificated LP or IXC shall submit a change request only if it has first certified to the LEC that at least one of the following actions has occurred:

(a) The provider has a letter of agency (LOA), as described in (3), from the customer requesting the change;

(b) The provider has received a customer-initiated call, and beginning six months after the effective date of this rule has obtained the following:

1. The information set forth in (3)(a)1. through 5.; and

2. Verification data including at least one of the following:

a. The customer's date of birth;

b. The last four digits of the customer's social security number; or

c. The customer's mother's maiden name.

(c) A firm that is independent and unaffiliated with the provider claiming the subscriber has verified the customer's requested change by obtaining the following:

1. The customer's consent to record the requested change or the customer has been notified that the call will be recorded; and

2. Beginning six months after the effective date of this rule an audio recording of the information stated in subsection (3)(a)1. through 5. . . .

Rule 24-4.118(3)(a), Florida Administrative Code, states:

(3)(a) The LOA submitted to the company requesting a provider change shall include the following information (each shall be separately stated):

1. Customer's billing name, address, and each telephone number to be changed;

2. Statement clearly identifying the certificated name of the provider and the service to which the customer wishes to subscribe, whether or not it uses the facilities of another company;

3. Statement that the person requesting the change is authorized to request the change;

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4. Statement that the customer's change request will apply only to the number on the request and there must only be one presubscribed local, one presubscribed local toll, and one presubscribed toll provider for each number;

5. Statement that the LEC may charge a fee for each provider change;

6. Customer's signature and a statement that the customer's signature or endorsement on the document will result in a change of the customer's provider. . . .

Staff believes that 154 of the complaints are apparent violations because Talk America did not provide any proof, LOA or TPV, that the customers authorized the company to change their service providers. In these cases, the company's responses to the customers' complaints indicated that the customer did authorize the change, but Talk America apparently did not verify by LOA or with an audio recording of the TPV that the customer authorized the switch as required by Rule 25-4.118(2), Florida Administrative Code.

In 10 of the complaints, Talk America's responses indicated that the company resubmitted the carrier change request to the LEC after the customers had canceled service. Again, Talk America did not provide any proof, in these 10 cases, that the customers authorized the company to switch their service.

Furthermore, in 100 of the complaints, the TPVs that Talk America submitted to the Commission in response to the complaints did not contain all of the information required by Rule 25-4.118(2)(c)2., Florida Administrative Code. Specifically, the TPV recordings were lacking the statements required by subsections 25-4.118(3)(a) 2., 4., and 5., Florida Administrative Code. Staff believes that without all of the required information on the TPV recording, the company has not complied with the rule and properly verified that the customers authorized the switch of their local, local toll, or toll provider to Talk America.

In 122 of the complaints, staff believes that the copies of the LOA checks submitted by Talk America to the Commission as proof the customer authorized a change in service providers are not valid due to incorrect customer information (customer name, address, and phone number) printed on the checks, or the customer's signature was not on the LOA check. Rule 25-4.118(3)(a), Florida Administrative Code, requires that the LOA submitted to the company

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requesting a provider change shall include the customer's billing name, address, and each telephone number to be changed. The rule also requires that the LOA include the customers signature. Staff believes that because the LOAs submitted to the company did not contain correct customer information or the customer's signature, Talk America has not complied with Rule 25-4.118, Florida Administrative Code, and properly verified that the customers authorized the switch of their local, local toll, or toll provider service to Talk America.

Furthermore, staff believes that the 122 LOA checks in question are also misleading and deceptive. Rule 25-4.118(4), Florida Administrative Code, states in pertinent part:

(4) The LOA shall not be combined with inducements of any kind on the same document. The document as a whole must not be misleading or deceptive. For purposes of this rule, the terms "misleading or deceptive" mean that, because of the style, format or content of the document or oral statements, it would not be readily apparent to the person signing the document or providing oral authorization that the purpose of the signature or the oral authorization was to authorize a provider change, or it would be unclear to the customer who the new provider would be; that the customer's selection would apply only to the number listed and there could only be one provider for that number; or that the customer's LP might charge a fee to switch service providers. . . .

In these 122 complaints, it is staff's opinion that the LOA checks did not readily identify who the new provider would be. The LOA checks stated:

. . . THE SIGNING, CASHING AND/OR DEPOSITING OF THIS CHECK WILL SWITCH YOUR LONG DISTANCE SERVICE AND LOCAL TOLL TO AOL LONG DISTANCE SAVINGS PLAN PROVIDED BY TALK.COM HOLDING CORP.

Also, the LOA checks denoted the AOL Online logo in the upper left hand corner. (See example in Attachment A) Staff believes that the style, format, and content of these LOA checks are deceptive and misleading in apparent violation of Rule 25-4.118(4), Florida Administrative Code.

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In 23 of the complaints, Talk America switched additional phone line(s) or it switched either the customers' local, intralata, or interlata service in addition to another service without the customers' specific authorization to do so. The customers agreed to have only one line or one type of service (local, local toll, or interlata long distance) switched, but Talk America switched more services than the customers authorized. Rule 25-4.118(3)(a)1. and 2., Florida Administrative Code, requires that the LOA or TPV include a statement that clearly identifies the service that the customer wishes to subscribe and each telephone number to be changed. In these cases, Talk America switched additional services or telephone numbers that were not clearly identified on the LOA or TPV in apparent violation of Rule 25-4.118(3)(a)1. and 2., Florida Administrative Code.

In 14 of the complaints, Talk America responded to the customers' slamming complaints by claiming that the customers initiated the call or the LEC selected its carrier code. However, in its responses, the company did not provide any verification data that proved the customers had, in fact, initiated the calls. Rule 25-4.118(2), Florida Administrative Code, requires a certificated LP (local provider) or IXC shall submit a change request only if it has first certified to the LEC that at least one on the following actions has occurred such as indicated in subsection 25-4.118(2)(b), Florida Administrative Code. Staff believes that by not obtaining the customers' verification information the company is in apparent violation of Rule 25-4.118(2)(b), Florida Administrative Code, which states:

- (b) The provider has received a customer-initiated call, and . . . has obtained the following:
 - 1. The information set forth in (3)(a)1. through 5.; and
 - 2. Verification data including at least one of the following:
 - a. The customer's date of birth;
 - b. The last four digits of the customer's social security number; or
 - c. The customer's mother's maiden name.

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In addition, staff believes that 99 of the 522 complaints are apparent slamming violations because the information Talk America provided the customers during telemarketing was misleading or deceptive in apparent violation of Rule 25-4.118(10), Florida Administrative Code, which states:

During telemarketing and verification, no misleading or deceptive references shall be made while soliciting for subscribers.

In 36 of the 99 complaints, Talk America representatives misquoted rates or periods of free service that the customers would receive. However, the customers reported they never received the promised rates or promotional incentives.

In 43 of the 99 complaints, Talk America promoted its local service as costing ten percent less than BellSouth for the same services. Talk America did not provide extended calling services for local customers as it had indicated during its solicitation, and ultimately, billed the customers at a much higher rate than what they had previously been paying as a BellSouth customer.

In 20 of the 99 complaints, the customers reported that they switched to Talk America based on the information presented to them during telemarketing. Talk America marketed its services as the AOL long distance or AOL local savings plan provided by Talk.com Holding Corp. During its solicitations, Talk America did not clearly indicate the provider to which the customer would be switching nor did the company disclose that the purpose of the call was to solicit a change in service providers in apparent violation of Rule 25-4.118(9)(a) and (b), Florida Administrative Code, which states:

(9) The company shall provide the following disclosures when soliciting a change in service from a customer:

- (a) Identification of the company;
- (b) That the purpose of the visit or call is to solicit a change of the provider of the customer;

Moreover, the customers indicated that they did not realize their service would be switched from their preferred carrier to Talk America. The complainants reported that they believed they were signing up for a savings plan offered by AOL as a membership perk or that AOL was providing the service. During the investigation, staff confirmed that Talk America apparently

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marketed its local and long distance services as a form of discounted savings plan offered by AOL. This promotion apparently caused a great deal of confusion among the company's customers. One example is a form letter (Attachment B) that was sent to existing AOL internet customers to solicit enrollment in a new savings plan. Nowhere in the letter does it disclose that the customers' service would be switched to any of Talk America's certificated names or its various doing-business-as names (Talk.com, Network Services, The Phone Company, The Other Phone Company, Inc., or Access One Communications.)

Staff believes Talk America's conduct of slamming customers in apparent violation of Commission Rule 25-4.118, Florida Administrative Code, is "willful" within the meaning and intent of Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[I]n our view, 'willful' implies intent to do an act, and this is distinct from intent to violate a statute or rule." Thus, any intentional act, such as Talk America's conduct at issue here, would meet the standard for a "willful violation."

Section 364.285(1), Florida Statutes, authorizes the Commission to impose upon any entity subject to its jurisdiction a penalty for each offense of not more than \$25,000 for each offense, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 364, Florida Statutes. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Therefore, based on the aforementioned, staff recommends that the Commission should order Talk America, Inc. to show cause in writing within 21 days of the Commission's order why it should not be fined \$10,000 per apparent violation, totaling \$5,220,000, for 522 apparent violations of Rule 25-4.118, Florida Administrative Code, Toll, Local Toll, or Toll Provider Selection. The company's response should contain specific allegations of fact and law. If Talk America, Inc. fails to respond to the show cause order or

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request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the fine should be deemed assessed. If Talk America, Inc. pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate Nos. 4099, 4100, 4692, and 2985 should be canceled.

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ISSUE 2: Should the Commission order Talk America, Inc., holder of Certificate Nos. 4099, 4100, 4692, and 2985, to show cause why it should not be fined \$10,000 per violation, totaling \$1,050,000, for 105 apparent violations of Section 364.604, Florida Statutes, Billing Practices?

RECOMMENDATION: Yes. The Commission should order Talk America, Inc. to show cause in writing within 21 days of the Commission's order why it should not be fined \$10,000 per apparent violation, totaling \$1,050,000, for 105 apparent violations of Section 364.604, Florida Statutes, Billing Practices. The company's response should contain specific allegations of fact and law. If Talk America, Inc. fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the fine should be deemed assessed. If Talk America, Inc. pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate Nos. 4099, 4100, 4692, and 2985 should be canceled. (Christensen, Helton, Buys)

STAFF ANALYSIS: Upon reviewing 1,024 of the complaints received against Talk America during the period from July 1, 1999, through May 31, 2001, staff believes that at least 105 of the complaints are apparent violations of Section 364.604(2), Florida Statutes, Billing Practices, which states:

A customer shall not be liable for any charges for telecommunications or information services that the customer did not order or that were not provided to the customer.

In 32 complaints, Talk America duplicated charges for services, fees, or taxes on the customer's bill.

In 18 complaints, Talk America billed the customer prior to provisioning service. Talk America routinely initiated the billing process prior to provisioning its service, sometimes for several months. Consequently, the customer received bills for a period of time in which they did not receive service from Talk America.

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In 5 complaints, Talk America billed customers for calling features the customer did not order or authorize. Upon switching service to Talk America, those customers were billed for services they did not order.

Talk America billed most of these customers by electronic fund transfer from their checking accounts or charging their credit card accounts. These complainants have reported that upon calling Talk America's customer service to inform the company of the billing problems, they experienced lengthy hold times. When the customers finally connected with a customer service representative, the representative often transferred the customers to another representative, who in turn transferred the customers again. Each time, the customers were put on hold. Consequently, the customers were never able to speak with a representative who could resolve their problems; the company continued to automatically deduct the monthly recurring charges from the customers' accounts.

Staff believes that Talk America's billing practices apparently violate Section 364.604(2), Florida Statutes, Billing Practices, because Talk America failed to provide the customers with a credit or refund for charges for services the company did not provide. The company resolved the overcharges and ceased billing only after the customers filed a complaint with the Commission.

In 50 cases, Talk America sent erroneous bills to consumers who were not presubscribed customers of Talk America. Talk America reported that on at least three occasions, during the period June 2000 through September 2000, and again in March of 2001, the company mailed out thousands of erroneous bills to consumers who reportedly used Talk America's 101XXXX code. The company billed the consumers for recurring charges and taxes that are customarily billed to presubscribed customers. In the first incident, Talk America provided an explanation (Attachment C) for the erroneous billing and indicated that it changed its data processing system to prevent a reoccurrence of the billing problem. The company also notified the affected consumers and instructed them to ignore the invoice (Attachment C, page 28). In that notice Talk America offered to give the customer \$25 worth of free long distance service if they called a special toll free number and signed up to receive a credit off their next long distance bill. This statement is very curious and raises additional questions and doubts as to the true nature of the erroneous invoices and subsequent offer of free long distance service. First, why would the customer have to

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sign up to receive \$25, and second, how would the customer receive the credit on their bill if they are not a Talk America customer? In the second erroneous billing incident, Talk America notified this Commission about the billing error in a letter dated March 30, 2001 (Attachment D). However, the company cited the same reason for the erroneous billing and again stated it was changing its data processing procedures to prevent the problem from reoccurring. Apparently, Talk America did not take the appropriate actions to prevent the billing error from occurring again as the company had indicated.

Staff believes that the erroneous bills Talk America sent out are a form of cramming and an apparent violation of Section 364.604(2), Florida Statutes, Billing Practices. First, the erroneous bills were sent out on at least three separate occasions; inferring that the company does not have the necessary procedures and controls in place to properly bill customers for its services. Second, the bills were for recurring charges and taxes associated with services that Talk America never provided. Third, cramming usually involves the practice of adding unauthorized charges on customers' regular bills, but in these cases, the company sent consumers whole bills with unauthorized charges listed on them. Staff sees no distinction between the two practices.

Staff believes Talk America's conduct of cramming customers in apparent violation of Section 364.604(2), Florida Statutes, Billing Practices, is "willful" within the meaning and intent of Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[I]n our view, 'willful' implies intent to do an act, and this is distinct from intent to violate a statute or rule." Thus, any intentional act, such as Talk America's conduct at issue here, would meet the standard for a "willful violation."

Section 364.285(1), Florida Statutes, authorizes the Commission to impose upon any entity subject to its jurisdiction a penalty for each offense of not more than \$25,000 for each offense, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 364, Florida Statutes. Utilities are

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charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Moreover, a precedent has been established for assessing \$10,000 per violation of Section 364.604(2), Florida Statutes. In Order No. PSC-99-1619-SC-TI, issued August 18, 1999, in Docket No. 981488-TI, the Commission ordered Accutel to show cause why it should not be fined in the amount of \$10,000 per violation for 171 apparent violations of Sections 364.10(1) and 364.604(2), Florida Statutes. Subsequently, in Order No. PSC-01-0915-FOF-TI, issued April 9, 2001, in Docket No. 981488-TI, the Commission ordered Accutel to pay the fine amount of \$1,710,000.

Therefore, based on the aforementioned, staff recommends that the Commission should order Talk America, Inc. to show cause in writing within 21 days of the Commission's order why it should not be fined \$10,000 per apparent violation, totaling \$1,050,000, for 105 apparent violations of Section 364.604(2), Florida Statutes, Billing Practices. The company's response should contain specific allegations of fact and law. If Talk America, Inc. fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the fine should be deemed assessed. If Talk America, Inc. pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate Nos. 4099, 4100, 4692, and 2985 should be canceled.

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ISSUE 3: Should the Commission order Talk America, Inc., holder of Certificate Nos. 4099, 4100, 4692, and 2985, to show cause why it should not be fined \$10,000 per violation, for a total of \$300,000, for 30 apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints?

RECOMMENDATION: Yes. The Commission should order Talk America, Inc. to show cause in writing within 21 days of the Commission's order why it should not be fined \$10,000 per apparent violation, totaling \$300,000, for 30 apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints. The company's response should contain specific allegations of fact and law. If Talk America, Inc. fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the fine should be deemed assessed. If Talk America, Inc. pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate Nos. 4099, 4100, 4692, and 2985 should be canceled. (Christensen, Halton, Buys)

STAFF ANALYSIS: During its review of the complaints against Talk America, staff discovered that the Division of Consumer Affairs (CAF) closed 30 of the complaints as apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints. During the period from May 23, 2000, through November 17, 2000, the CAF received 30 customer complaints against Talk America's affiliate, Access One Communications, in which no written response was received from the company within 15 working days from the date of staff's inquiry. Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, states:

The staff member will notify the company of the complaint and request a response. The company shall provide its response to the complaint within fifteen (15) working days. The response shall explain the company's actions in the disputed matter and the extent to which those actions were consistent with applicable statutes and regulations. The response shall also describe all attempts to resolve the customer's complaint.

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Staff's analysis revealed that before, during, and after the May 23, 2000, through November 17, 2000, time period, Talk America had responded to other complaints received by the Commission. Thus, there does not appear to be any one particular time period in which the company did not respond or any other significant mitigating reason as to why there was no response to the 30 complaints in question.

In April 2001, each of the complaints in which no response was received were closed as violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints. Subsequently, the complaints were sent to Talk America's ALEC operation in an attempt to have the company's response in the Consumer Activity Tracking System (CATS). Although Talk America did respond to all but three of the complaints by May 2001, the initial responses were not received by the Commission in apparent violation of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints.

Staff believes Talk America's failure to respond to customer complaints in apparent violation of Commission Rule 25-22.032(5)(a), Florida Administrative Code, is "willful" within the meaning and intent of Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[I]n our view, 'willful' implies intent to do an act, and this is distinct from intent to violate a statute or rule." Thus, any intentional act, such as Talk America's conduct at issue here, would meet the standard for a "willful violation."

Section 364.285(1), Florida Statutes, authorizes the Commission to impose upon any entity subject to its jurisdiction a penalty for each offense of not more than \$25,000 for each offense, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 364, Florida Statutes. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

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Further, the proposed fine amount per violation is consistent with amounts the Commission previously imposed for similar violations.

Therefore, based on the aforementioned, staff recommends that the Commission should order Talk America, Inc. to show cause in writing within 21 days of the Commission's order why it should not be fined \$10,000 per apparent violation, totaling \$300,000, for 30 apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints. The company's response should contain specific allegations of fact and law. If Talk America, Inc. fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the fine should be deemed assessed. If Talk America, Inc. pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate Nos. 4099, 4100, 4692, and 2985 should be canceled.

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ISSUE 4: Should these dockets be closed?

RECOMMENDATION: No. If staff's recommendation in Issues 1, 2, or 3 are approved, Talk America will have 21 days from the issuance of the Commission's show cause order to respond in writing why it should not be fined in the amount proposed or have its certificates canceled. If Talk America timely responds to the show cause order, these dockets should remain open pending resolution of the show cause proceedings. If Talk America fails to respond to the show cause order or pay the proposed fines within ten business days after the expiration of the 21-day response period, certificate numbers 4099, 4100, 4692, and 2985 should be canceled and these dockets may be closed administratively. (Christensen, Helton)

STAFF ANALYSIS: If staff's recommendation in Issues 1, 2, or 3 are approved, Talk America will have 21 days from the issuance of the Commission's show cause order to respond in writing why it should not be fined in the amount proposed or have its certificates canceled. If Talk America timely responds to the show cause order, these dockets should remain open pending resolution of the show cause proceedings. If Talk America fails to respond to the show cause order or pay the proposed fines within ten business days after the expiration of the 21-day response period, certificate numbers 4099, 4100, 4692, and 2985 should be canceled and these dockets may be closed administratively.